IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2597 OF 2005

1. The Jam Shri Ranjitsinghji
   Spg. & Wvg. Mills Co. Ltd.,
   Rajesh Mansion, 140 Maharshi
   Karve Road, Bombay 400 020.

2. Shree Ratan Gandhi,
   140, Maharshi Karve Road,
   Bombay - 400 020. .. Appellants.

V/s.

1. Union of India
   (Notice to be served on
   the Secretary, Ministry of
   Finance, Department of
   Revenue, New Delhi.

2. The Collector of Central
   Excise,
   P.M.C. Commercial Bldg.,
   Hirabaug, Tilak Road,
   Poona

3. The Assistant Collector
   of Central Excise,
   Solapur Division,
   Indra-Prastha, 25, Rly.
   Lines, Solapur.

4. The Superintendent
   Central Excise, L.V.
   Range, Station Road,
   Solapur.

5. Central Board of Excise
   & Customs, New Delhi. .. Respondents.

Mr.M.H. Patil with Mr.M.L. Patil, Ms.Aparna Hindargi, Mr.T. Chandran Nair & Ms.Poornima Patil for the appellants.

Smt.N.V. Masurkar with Mr.V.S. Masurkar, Mr.P.S. Jetly & Mr.R.C. Master for the respondent - Union of India.

CORAM : F.I. REBELLO & J.P. DEVADHAR, JJ.

JUDGMENT RESERVED ON : 1ST AUGUST, 2007.

JUDGMENT PRONOUNCED ON : 7th SEPTEMBER, 2007.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. This Excise Appeal (wrongly numbered as First Appeal) was admitted on 29th June, 2006 on a substantial question of law which on being reframed by us reads as follows :

> "Whether on the facts and in the circumstances of the case, the CESTAT was justified in holding that the yarn manufactured and cleared by the appellant for captive consumption during the period from May, 1981 to May, 1984 under the self removal procedure was under provisional assessment as contemplated under Rule 9B of the Central Excise Rules, 1944, even though there was no dispute about the classification or valuation of the yarn cleared for captive consumption ?"

2. The appellants were engaged in the manufacture of cotton and manmade yarn as well as manufacture of fabrics covered under various tariff items of the Central Excise Tariff. Yarn manufactured by the appellants were either sold to the customers or were captively consumed in the manufacture of fabrics.

3. It is not in dispute that the classification list as well as the price list filed by the appellant in respect of the yarn manufactured by them were approved by the excise authorities and the appellant used to clear the yarn for captive consumption within the factory or clear the same outside the factory on payment of appropriate excise duty.

4. On 16th October, 1980, the Delhi High Court delivered a judgment in the case of J.K. Cotton Spg. Wvg. Mills (8 E.L.T. 837) holding that under Rule 9 & 49 of the Central Excise Rules, 1944 ('1944 Rules for short) excise duty is not leviable on the yarn manufactured and cleared for captive consumption in a continuous uninterrupted and integrated process of manufacture.

5. In the light of the said judgment, the appellant filed a Writ Petition bearing No.1063 of 1981 in the Delhi High Court seeking a declaration that excise duty is not leviable on the yarn manufactured and cleared by them for captive consumption within their factory premises. On 8th May, 1981, the Delhi High Court passed an interim order in the said Writ Petition to the effect that till the disposal of the petition no excise duty

shall be recovered from the appellant on the yarn cleared for captive consumption, subject to the appellant furnishing a bond for the disputed duty and a bank guarantee for 50% of the disputed duty.

6. Accordingly, from May, 1981 the appellant cleared the yarn manufactured by them for captive consumption within the factory without payment of excise duty by executing a bond in form B-13 applicable to the provisionally assessed goods and on furnishing a bank guarantee for 50% of the disputed excise duty. In the B-13 Bond executed by the appellant, it was specifically stated that the yarn is cleared under provisional assessment pending final assessment and that on finalisation of the provisional assessment, the duty determined would be paid into the Government Treasury by the appellant within 10 days of the demand.

7. In the meantime, with a view to overcome the decision of the Delhi High court in the case of J.K. Cotton Mills (supra), the Central Government amended Rule 9 and 49 of the 1944 Rules by Finance Act, 1982 with retrospective effect from 28th February, 1944 by inserting an Explanation in each rule. By the said explanation it was provided that the excisable goods consumed or utilised in the manufacture of any other commodity in a continuous process or otherwise

shall be deemed to have been removed from such place immediately before such consumption or utilisation. The purpose of the said amendment was to validate the liability to pay excise duty on the goods cleared and consumed or utilised in the manufacture of any other commodity in a continuous process or otherwise with retrospective effect from 28th February, 1944. The appellant amended the writ petition pending before the Delhi High Court to challenge the validity of the retrospective amendment to Rule 9 and 49 of the 1944 Rules.

8. Thereafter, the Delhi High Court by its Judgment and Order dated 11th January, 1983, passed in the case of J.K. Cotton Spg. & Wvg. Mills and others reported in 1983(12) E.L.T. 239 upheld the retrospective amendment to Rule 9 and 49 and while dismissing a group of writ petitions held that the recoveries or refund, if any, arising on account of the retrospective amendment to Rule 9 & 49 would be subject to the limitation prescribed under Section 11-A and 11-B of the Central Excise Act, 1944 (‘1944 Act’ for short).

9. Following the above decision rendered in the case of J.K.Cotton Mills, the Delhi High Court on 17th April, 1984 dismissed the Writ Petition filed by the appellant as well as several other textile

mills by holding that the amendments to Rule 9 & 49 are valid and constitutional and recoveries for the past period would be subject to the provisions of section 11A of the 1994 Act.

10. Challenging the decision of the Delhi High Court dated 17th April, 1984, the appellant filed a Special Leave Petition before the Apex Court. In the said Special leave petition, the Apex Court passed an interim order on 4th May, 1984 to the effect that there will be no stay in respect of future clearances and as regards the past dues, the Apex Court directed the appellant to pay 50% of the disputed duty by 31st August, 1984 and for the balance 50% of the disputed duty, directed the appellant to give a bank guarantee and bond to the satisfaction of the Registrar of the Apex Court. Accordingly, the appellant paid 50% of excise duty in respect of the yarn cleared during the period from May, 1981 to May, 1984 and furnished bank guarantee for the balance amount.

11. On 30th October, 1987, the Apex Court finally disposed of a batch of Civil Appeals, the lead matter being the case of J.K. Spg. & Wvg. Mills and others reported in 1987 (32) E.L.T. 234. By the said decision, the Apex Court while upholding the constitutionality of the retrospective amendment

to Rule 9 and 49 of the 1944 Rules by Finance Act, 1982, held that the recovery of excise duty on account of retrospective amendment shall be subject to the limitation prescribed under Section 11-A of the 1944 Act.

12. Similar orders were passed by the Apex Court in the case of Rohit Mills Limited and others reported in 1988 (18) E.C.R. 17. The Civil Appeal filed by the appellant and other textile mills including the appeal filed by Morarji Gokuldas Mills Ltd. were dismissed by the Apex Court on 17th January, 1995 reported in 83 E.L.T. 259. The said order reads thus :-

O R D E R

" In this group of cases common questions arise for determination. They are covered by the decision of this Court in M/s. J.K.Cotton Spinning & Weaving Mills Ltd. and Anr. Vs. Union of India and others 1987 (Suppl) SCC 350 = AIR 1988 SC 1940. By the said decision this Court upheld as legal and valid the amendments made to Rules 9 and 49. It was argued that if the amendments are given retrospective effect from the date the Rules were framed i.e. from February 28, 1944, the assesses would be required to pay an enormous amount of duty. This Court appreciated the contention that if the duty has to be paid with retrospective effect from 1944 it would undoubtedly cause great hardship to the assessees but concluded that in view of Section 11-A of the Act such an apprehension was misplaced. Pointing to clause (1) of section 11-A it held that it engrafts a rule of limitation of six months and since the proviso to section 11-A is not applicable the demand though it may include even a

> demand for more than six months must be made within a period of six months from the date of the amendment.
>
> Having considered the facts in this group of cases, in our view, in the light of the observation in J.K. Cotton Spinning & Weaving Mills it would be appropriate to direct that in cases where notices under Section 11-A of the Act have been served and the claims are raised within a period of six months from the relevant date, the Revenue would be entitled to realise the dues. In case of dispute as to whether the notice under Section 11-A had been served or not the Assistant Collector will decide the issue. However, in cases where the notices have not been served as yet the Revenue would be entitled to do so within the time limit prescribed by Section 11-A of the Act. In either of the aforesaid eventualities orders will not be passed by the authorities without giving an opportunity to the assessee to make representations against the proposed orders. If notices have already been served for the aforesaid purpose the assessees would have eight weeks time from today to reply or to make a representation. The Bank guarantees furnished by the assessees shall be made available for realisation of dues, if any, by the Revenue.
>
> The interim orders shall stand modified as above.
>
> The appeals will stand disposed of accordingly, with no order as to costs".

13. As the liability to pay the excise duty on the yarn cleared for captive consumption was finally upheld by the Apex Court, the Range Superintendent proposed to finalise the provisional assessment made in respect of the yarn cleared for captive consumption during the period from May, 1981 to May, 1984. The appellant objected to the finalisation of the provisional assessment inter alia on the ground

that in the absence of any show cause notice issued under Section 11-A of the 1944 Act within six months from the date of amendment of Rule 9 and 49 of the 1944 Rules, recovery of excise duty would be barred by limitation.

14. The Range Superintendent rejected the contention of the appellant and finalised the provisional assessments on 19th May, 1995 and determined the duty payable on the yarn cleared for captive consumption during the period from May, 1981 to May, 1984 at Rs.1,37,56,641.30 and after giving credit to the amount of Rs.68,78,320.65 already paid and after adjusting the sanctioned refund of Rs.5,21,217.89, the appellant was called upon to pay the balance excise duty amount of Rs.63,57,102.76 immediately.

15. The appellant thereupon filed Special Civil Suit No.249 of 1995 before the C.J.S.D., Solapur inter alia seeking permanent injunction restraining the excise authorities from enforcing the aforesaid demand. In the said suit, interim order was passed restraining the authorities from enforcing the demand confirmed on 19th May, 1995. Thereafter, by a judgment and order dated 24th July, 1995 the C.J.S.D., Solapur was pleased to dismiss the said Special Civil Suit No.249 of 1995. First Appeal

No.652 of 1995 filed by the appellant against the judgment dated 24th July, 1995 was also dismissed by this court on 22nd August, 1995 inter alia on the ground that the appellant has an alternate remedy of filing appeal before the appellate authority under the 1944 Act.

16. The appellant then filed an appeal before Commissioner of Central Excise (Appeals), Pune and sought waiver of predeposit of the demand raised on 19th May, 1995. By an order dated 28th September, 1995 the Commissioner (Appeals) rejected the application for waiver of predeposit. Writ Petition No.4763 of 1995 filed by the appellant against the order of the Commissioner (Appeals) was dismissed by this Court on 24th January, 1996.

17. Thereafter on merits, the Commissioner (Appeals) by his order dated 16th December, 1996 dismissed the appeal filed by the appellant inter alia on the ground that during the relevant period, the yarn was cleared for captive consumption on provisional assessment and, therefore, the revenue was entitled to finalise the provisional assessment and raise demand without issuing notice under Section 11-A of the 1944 Act.

18. Challenging the order passed by the

Commissioner (Appeals), the appellant filed further appeal before CESTAT. There was a difference of opinion between the two members of the CESTAT and, therefore, the matter was referred to a third member. In the light of the decision given by the third member, the Tribunal by its order dated 1st July, 2005 upheld the order of Commissioner (Appeals) and dismissed the appeal filed by the appellant. Challenging the order of the Tribunal dated 1st July, 2005, the present appeal is filed.

19. To complete the narration of facts, it may be noted that the revenue has already recovered the balance of excise duty determined as payable on finalisation of the provisional assessment on 19th May, 1995 by encashing the bank guarantees furnished by the appellant pursuant to the order passed by the Apex Court.

20. Mr.Patil, learned counsel for the appellant submitted that the question raised in this appeal is squarely covered by the decision of this Court dated 17th February, 2005 in Central Excise Application No.2 of 2001 (CCE V/s. Morarji Gokuldas Spg. & Wvg. Mills Co. Ltd.). In that case, the revenue had conceded that in the light of the decisions of the Apex Court in the case of **Metal Forgings V/s. Union of India** reported in **146 E.L.T. 241** and in

the case of **J.K. Cotton Spg. & Wvg. Mills Co. Ltd. V/s. Commissioner of Central Excise** reported in **99 E.L.T. 8**, excise duty on yarn cleared for captive consumption cannot be recovered without issuing a notice under section 11-A of the 1944 Act. Accordingly, Mr.Patil submitted that in the present case, admittedly, the revenue has not issued a notice under section 11-A of the 1944 Act and, therefore, the demand raised in respect of the yarn cleared for captive consumption during the period from May, 1981 to May,1984 is clearly time barred.

21. Mr.Patil further submitted that the authorities under the Excise Act were clearly in error in holding that the clearance of yarn for captive consumption during the relevant period was under provisional assessment. He submitted that under Rule 9B of the 1944 Rules provisional assessment is permissible under three circumstances, namely (one) where the proper officer is satisfied that the assessee is unable to produce any document or furnish information necessary for the assessment (two) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment and (three) where, even after the assessee has produced all the documents and furnished full particulars, the proper officer deems it necessary to make further enquiry.

Similarly, under Rule 173B and 173C of the 1944 Rules provisional assessments may be made in cases where there is likelihood of delay in approving the classification list or the price list. In the present case, none of the exigencies set out in Rule 9B existed and, therefore, provisional assessment could not be made under Rule 9B. Similarly, the classification list and the price list being approved by the proper officer provisional assessment could not be made under Rule 173B or 173C of the 1994 Rules. The fact that the appellant at the instance of the excise authorities had executed a B-13 Bond at the time of clearance of the yarn would not make the assessments provisional especially when none of the grounds for making the provisional assessment under Rule 9B or 173B or 173C of the 1994 Rules existed. In this connection Mr.Patil relied upon a decision of the Madras High Court in the case of **Chemicals & Plastics India Ltd. V/s. Union of India (74 E.L.T. 549)**.

22. Mr.Patil further submitted that provisional assessment can be resorted to before clearance of goods and not after clearance of the goods. In the present case, no provisional assessment order has been made under Rule 9B before clearance of the goods. It is only after the clearance of the yarn for captive consumption under the self removal

procedure when the appellant filed RT 12 returns at the end of the month, the excise authorities made endorsements on the RT 12 returns to the effect that the assessments were provisional. He submitted that in the absence of a provisional assessment order was passed before clearance of the yarn for captive consumption, it is not open to the revenue to contend on the basis of the endorsements made on the RT-12 returns that the assessments were provisional. This is because, RT-12 returns can be assessed provisionally only if there is a provisional assessment order passed under Rule 9-B before clearance of the goods. In the present case, no order is passed under Rule 9-B before clearance of the yarn and, therefore assessing the RT-12 returns provisionally under Rule 9-B(1) did not arise at all. In this connection, he relied on a decision of the Apex Court in the case of **CCE V/s. Kosan Metal Products Ltd. (38 E.L.T. 573**).

23. Relying upon the Board's Circulars dated 24/4/1989 and 25/5/1990 and the decisions of the Apex Court in the case of **Samrat International (P) Ltd. V/s. CCE (58 E.L.T.561), J.K. Cotton Spg. & Wvg. Mills Co. Ltd. V/s. CCE (99 E.L.T.3), Coastal Gases & Chemicals Pvt. Ltd. V/s. ACCE (92 E.L.T.460), Metal Forgings V/s. Union of India (146 E.L.T 241) and CCE V/s. Hindustan National Glass &**

Indus.Ltd. (182 E.L.T. 12)), Mr.Patil submitted that the assessments cannot be treated as provisional solely on the premise that the matter was subjudice or that the appellant had executed B-13 Bond and that endorsements have been on the RT-12 returns to the effect that the assessments are provisional. He submitted that there must be an order passed under Rule 9-B before clearance of the yarn and in the absence of such order the assessments could not be treated as provisional.

24. Mr.Patil further submitted that neither the Delhi High Court by its interim order had directed that clearance should be on provisional assessment basis, nor execution of B-13 Bond in implementation of the Delhi High Court order would make the assessments provisional because neither there were any circumstances for making provisional assessment nor in fact any provisional assessment order was made before clearance of the yarn for captive consumption. In this connection, he relied upon the decisions of the Tribunal in the case of **Morarji Gokuldas Spg. & Wvg. Ltd. V/s. CCE (40 R.L.T.364), Modipan Ltd. V/s. CCE (62 (R.L.T.132) and Commissioner of Customs V/s. Surya Roshni Ltd. (112 E.L.T.398)**.

25. Relying on the decision of the Calcutta High

Court in the case of **Asstt. Collector of Central Excise V/s. Shree Gobinda Glass (1972 CWN 137)** and **Shri Gobinddeo Glass Works Ltd. V/s. ACCE (126 E.L.T. 399)**, Mr.Patil submitted that even if the parties proceed on a mistaken notion that a provisional assessment could be made, it cannot be said that a provisional assessment has in fact been made.

26. Finally, Mr.Patil submitted that once it is established that during the relevant period the yarn was not cleared for captive consumption under provisional assessment, then, the excise duty recoverable under the amended Rule 9 and 49 as interpreted by the Apex Court in the case of **J.K. Cotton Mills Ltd.** reported in **99 E.L.T. 3** can be recovered only if a show cause notice has been issued within the period of limitation prescribed under Section 11-A of the 1944 Act. In the present case, admittedly no show cause notice is issued under section 11A of the 1944 Act. Assuming that there was provisional assessment, Mr.Patil submitted that no show cause notice has been issued before finalisation of the provisional assessment and no show cause notice has been issued within six months from the date of adjustment on finalisation of the provisional assessment as mandatorily required under Section 11(A)(3)(ii)(b) of the 1944 Act. In this

connection, Mr.Patil relied upon a decision of the Apex Court in the case of CCE V/s. ITC Limited reported in 203 ELT 532. Accordingly, Mr.Patil submitted that in the absence of a provisional assessment and in the absence of a notice under Section 11-A of the 1944 Act, the revenue could not have recovered the time-barred claim by encashing the bank guarantees furnished by the appellant.

27. Mrs.Masurkar, learned counsel appearing on behalf of the revenue, on the other hand, took us through the B-13 Bond executed by the appellant wherein it is categorically admitted by the appellant that the yarn is cleared on provisional assessment basis and that the appellant specifically agreed to pay the duty determined on finalisation of the provisional assessment within the stipulated time. B-13 Bond is executed only when there is provisional assessment. Therefore, having executed B-13 Bond, it is not open to the appellant to contend that the clearances during the relevant period were not on provisional assessment basis.

28. Mrs.Masurkar further referred to the provisional assessment order passed under Rule 9-B of the 1944 Rules on the RT-12 returns, which reads thus :

"Assessment Memorandum"

1. The assessee has paid duty on the above goods except to the extent indicated below:-

i) The duty debited less by the assessee as indicated above should be paid by the assessee within 10 days by debit in his personal ledger a/c. The assessee may take credit for the duty on excess as indicated above in his ledger a/c.

Duty on the goods removed under gate pass (ss) and included in his return has been assessed provisionally under Rule 9-B and provision of the said rule shall apply for recovery of the deficiency in or refund of excise duty. Pending disposal of W.Ps in the Court of Law."

Accordingly, Mrs.Masurkar submitted that in the present case, specific provisional assessment order has been passed pending disposal of the Writ Petition filed by the appellant before the Delhi High Court and on dismissal of the writ petition by the Delhi High court and thereafter dismissal of the Civil Appeal by the Apex Court, the revenue was justified in finalising the provisional assessments

and recover the excise duty in accordance with law.

29. Mrs.Masurkar further submitted that on finalisation of the provisional assessment instead of paying the confirmed demand, the appellant filed civil suit in the Court of Civil Judge Senior Division at Solapur and obtained stay of recovery of the duty demand. Subsequently, the said suit was dismissed. The appeal filed against said decision was also dismissed. Thereafter, the appellants filed appeal against the finalisation of the provisional assessment before the Commissioner of Central Excise (Appeals). The said appeal was dismissed by the Commissioner of Central Excise (Appeals). Further appeal filed by the appellants was also dismissed by the CESTAT. Having failed in all the judicial proceedings, the appellant has filed the present Appeal even though there is no merit in the appeal. In these circumstances, she submitted that it is not open to the appellant to contend that no notice has been issued for recovery of duty after the finalisation of the provisional assessment.

30. With reference to various decisions relied upon by the counsel for the appellant, Mrs.Masurkar submitted that the said decisions are distinguishable on facts, because in the present

case, clearances were effected on provisional assessment basis and the same is recorded on the RT-12 return and therefore, the question of issuing notice under Section 11-A of the 1944 Act did not arise at all. With reference to the decision of this Court dated 17-2-2005 in Central Excise Appeal No.2 of 2001 (C.C.E. v/s. Morarji Gokuldas Spg. & Wvg. Mills Co. Ltd.), Mrs.Masurkar submitted that in that case the C.E. Application filed by the revenue was dismissed not on merits but on a wrong concession made by the counsel for the revenue. She submitted that the wrong concession made by a counsel would not bind the revenue. In this connection, she relied on a judgment of the Apex Court in the case of Central Council V/s. Dr.K. Santhakumari reported in (2001) 5 S.C.C. 60. Accordingly, Mrs.Masurkar submitted that there is no merit in the appeal and the same be dismissed.

31. We have carefully considered the rival submissions.

32. The short question to be considered in this appeal is, whether the yarn cleared by the appellant for captive consumption during the period from May, 1981 to May, 1984 as per the interim order passed by the Delhi High Court were under the provisional assessment or not ? According to the appellant

neither there were any circumstances existing for making provisional assessment nor in fact any provisional assessment order was passed before clearance of the goods and, therefore, recovery of excise duty under the amended Rule 9 & 49 of the 1944 Rules could not be made without issuing a show cause notice under Section 11-A within the period of limitation prescribed under the 1944 Act. According to the revenue, the clearances were effected on provisional assessment basis and, therefore, on dismissal of the appellant's Writ Petition by the Delhi High Court and dismissal of the Civil Appeal by the Apex Court, the revenue was justified in finalising the provisional assessments and recover the excise duty.

33. The question, therefore, to be considered is, firstly, whether circumstances for making provisional assessment existed in the present case and secondly, whether a provisional assessment order was made before clearance of the yarn for captive consumption ?

34. With rererence to the first contention, the argument of the appellant is that none of the circumstances for making provisional assessment set out in Rule 9B existed in the present case. Moreover, classification list and the price list

were already approved, and therefore, there was no scope for making provisional assessment. There is no merit in this contention because under Rule 9-B(1)(c) of the 1944 Rules, even after the assessee has produced all the necessary documents and furnished full information for the assessment of duty it was open to the assessing officer to make provisional assessment either on a written request made by the assessee or if the proper officer deemed it necessary to make further inquiry. In the present case, admittedly there was a dispute pending before the Delhi High Court regarding the excisability of the yarn cleared for captive consumption. Pending final decision of the Delhi High Court, it was open to the appellant to seek and to the proper officer to allow clearance of yarn for captive consumption on provisional assessment basis. In fact, in the B-13 Bond it is recorded that the appellant had sought provisional assessment. Even if the contention of the appellant that the B-13 Bond was executed at the instance of the excise authorities, is accepted, in view of the fact that a dispute was pending before the Delhi High Court, it was open to the proper officer to insist on clearing the yarn for captive consumption on provisional assessment basis.

35. The next question to be considered is,

whether a provisional assessment order was in fact made before clearance of yarn for captive consumption on provisional assessment basis ? It is not in dispute that during the period from May, 1981 to May, 1984 the appellant had cleared the yarn for captive consumption by executing B-13 Bond which is applicable to provisionally assessed goods. It is pertinent to note that the Delhi High Court by its interim order had not directed the appellant to execute B-13 Bond. Apart from B-13 Bond, there are various types of Bonds specified in Appendix I to the 1944 Rules, which could be executed by the appellant. The fact that the appellant claims to have executed the B-13 Bond at the instance of the revenue clearly shows that as per the directions given by the proper officer, the clearances have been effected on provisional assessment basis by executing B-13 Bond.

36. It is not the case of the appellant that B-13 bond was executed inadvertently or by mistake. Therefore, having consciously cleared the yarn for captive consumption on provisional assessment basis by executing B-13 Bond as directed by the excise authorities, it is not open to the appellant to contend that there was no order/directions to clear the yarn on provisional assessment basis.

37. The argument that the assessment can be said to be provisional only if there is a specific order in writing passed before clearance of the goods is devoid of any substance, because Rule 9B of the 1944 Rules relating to provisional assessment of duty does not envisage passing of an order in writing before clearance of the goods. What Rule 9B provides is that, where the proper officer, pending further inquiry considers it proper to allow clearance on provisional assessment basis, then he may direct that the goods be assessed provisionally by executing a Bond in the proper form. Thus, Rule 9B contemplates giving direction for provisional assessment by executing Bond in the proper form. In the present case, it is the case of the appellant that as per the direction given by the excise officer the goods have been cleared by executing B-13 Bond wherein the appellant has specifically agreed to abide by the provisions relating to the provisional assessment of duty. Thus, in the present case, even though there is no order in writing, it is established that the clearances were effected by the appellant under the self assessment procedure as per the directions given by the excise officers by executing B-13 Bond and the same is further fortified by the specific endorsement made on the RT-12 returns to the effect that the assessments were provisional.

38. Strong reliance was placed by the appellant on the decisions of the Apex Court in the case of **J.K. Cotton Mills** reported in **99 E.L.T. 8 (S.C.), Coastal Gases & Chemicals Pvt. Ltd.** reported in **92 E.L.T. 460 (S.C.), CCE V/s. Hindustan National Glass & Ind. Ltd.** reported in **182 E.L.T. 12 (S.C.)** and **Metal Forgings** reported in **146 E.L.T. 241 (S.C.)**.

39. At the outset, it may be noted that the observations made by the Apex Court in all the above cases regarding the issuance of notice under Section 11-A of the 1944 Act was in the context of the excise duty that became payable on account of the Apex Court upholding the validity of the amendment to Rule 9 and 49 of the 1944 Rules with retrospective effect from 28-2-1944. Obviously, the said observations were meant to apply to cases where the final assessments were already made and not in respect of cases where the assessments were provisional, because duty liability is determined only at the time of final assessment. In other words, what is held in all the above cases is that, in spite of the retrospective amendment to Rule 9 and 49 is upheld, where the assessments are already finalised the duty under the amended Rule 9 and 49 can be recovered only by issuing notice under

Section 11A of the 1944 Act.

40. This is evident from the fact that in the case of J.K. Cotton Mills (supra) in respect of the clearances effected during the pendency of the dispute, there was no direction to clear the goods on provisional assessment basis. In that case, neither the goods were cleared by executing B-13 Bond nor there were any endorsements made on the RT-12 returns to the effect that the assessments were provisional. Moreover, in the show cause notice issued by the revenue it was not even averred that the goods were cleared on provisional assessment basis. In fact, the Assistant Collector in that case treated the assessments as provisional solely on the premise that the matter was subjudice and the basic argument of the revenue was that the stay granted by the Delhi High Court virtually amounted to stay of service of notice under Section 11-A of the Excise Act. In the facts of that case, where the assessments had attained finality and where there was no evidence whatsoever to establish that the clearances were effected on provisional assessment basis, the Apex Court held that in the absence of an express order of provisional assessment made under Rule 9B, the assessments cannot be treated as provisional.

41. In the present case, it is the case of the

appellant that the excise authorities had directed the appellant to clear the yarn for captive consumption on provisional assessment basis by executing B-13 Bond and accordingly the appellant had cleared the yarn by executing B-13 Bond specifically stating therein that the provisions relating to provisional assessment will be compiled with. Moreover, in the present case there is specific endorsement made on the RT-12 returns to the effect that the assessments were provisional. In these circumstances, we have no hesitation in holding that the ratio laid down by the Apex Court in the case of J.K.Cotton Mills (supra) is not applicable to the facts of the present case.

42. The decision of the Apex Court in the case of Coastal Gases & Chemicals Pvt.Ltd. (supra) does not support the case of the appellant. In that case there was no material on record to show as to whether the clearances were effected on provisional assessment basis or not and, therefore, the Apex Court remanded the matter for fresh consideration. In the present case, there is voluminous evidence on record to show that the clearances were on provisional assessment basis and hence the reliance placed on the above decision is misplaced.

43. Similarly, the ratio laid down by the Apex

Court in the case of Metal Forgings (supra) does not support the case of the appellant. In that case the Asstt. Collector had passed an order on 21/1/1976 to the effect that the goods manufactured by Metal Forgings were classifiable under Tariff Item 68. The said order was challenged in various proceedings by way of appeal / revision / writ petition and said proceedings continued till 2002. The question before the Apex Court was whether the order passed by the Asstt. Collector on 21/1/1976 was on provisional assessment basis and whether the clearances effected during the pendency of the above proceedings without following the procedure under Rule 9B could be said to be on provisional assessment basis ? Admittedly, in the order passed on 21-01-1976, the Assistant Collector had not stated that he was classifying the goods under Tariff Item 68 on provisional assessment basis. Moreover, there was no material on record to show that during the pendency of the proceedings the clearances were effected by following the procedure under Rule 9B. In that context, the Apex Court held (see para 12) that there should be first of all an order under Rule 9B of the Rules and then material to show that the goods were cleared on provisional basis. In the present case, it is the case of the appellant that there was a direction given by the excise authorities to clear the yarn on provisional

assessment basis by executing B-13 Bond and accordingly the appellant did clear the yarn by executing B-13 Bond and further agreed to comply with the provisions relating to provisional assessments. Moreover, the assessing officer had made endorsements on the RT-12 returns to the effect that the clearances were on provisional assessment basis. In these circumstances, reliance placed on the decision of the Apex Court in the case of Metal Forgings (supra) is also misplaced. In the case of Hindustan National Glass (supra), the Apex Court has followed its decision in the case of Metal Forgings (supra) and hence the said decision also does not support the case of the appellant.

44. Strong reliance was placed on the decision of the Apex Court in the case of Kosan Metal Products Limited (supra). In that case, by a show cause notice dated 19-1-1980 issued under Rule 10 of the 1944 Rules, Kosan Metals was called upon to show cause as to why duty amounting to Rs.51,261.88 payable in respect of the goods cleared during the period from 24-7-1978 to 31-3-1979 should not be recovered. The contention of Kosan Metals was that in the absence of any allegation of fraud, collusion, wilful misstatement or suppression of facts, notice issued beyond the period of six months would be time-barred. The revenue contended that in

view of the endorsements made on the RT-12 returns to the effect that there was short payment of duty, the notice would not be time-barred. Rejecting the contention of the revenue, the Apex Court held that mere endorsement on the RT-12 return to the effect that there was short payment of duty would not be a valid ground for upholding the notice issued beyond the period of six months. Thus, in the case of Kosan Metals (supra) neither the clearances were effected on provisional assessment basis nor the endorsement on the RT-12 were to the effect that the assessments were provisional. In fact, the issue of provisional assessment was not even raised in that case. Therefore, reliance placed on the decision of the Apex court in the case of Kosan Metals (supra) is wholly misplaced.

45. As rightly contended by the counsel for the revenue, the dismissal of the Central Excise Appeal No.2 of 2001 by this court in the case of Morarji Gukuldas Spg. & Wvg. Mills Co. Limited (supra) was not on merits but on a concession made by the counsel for the revenue. The Apex Court in the case of Dr.K. Santakumari (supra) has held that wrong concession made by a counsel would not bind the parties. As the decisions in the case of Metal Forgings (supra) and J.K. Cotton Mills (Supra) which were relied upon by the counsel for the

revenue in the case of Morarji Gokuldas Mills (supra) are distinguishable on facts, the appellant cannot take advantage of the wrong concession made by the revenue in the case of Morarji Gokuldas Mills case (supra).

46. Thus, in the facts of the present case, the revenue has clearly established that the clearances were effected on provisional assessment basis and accordingly the finalisation of the provisional assessments after the dismissal of the Writ Petition filed by the appellant before the Delhi High Court and dismissal of the Civil Appeal by the Apex Court cannot be faulted. In this view of the matter, we do not consider it necessary to deal with various decisions of other High Courts and the Tribunal which were relied upon by the counsel for the appellant.

47. One important aspect of the matter which is lost sight of by the appellant is that, in the present case, in respect of clearances effected by the appellant during the period from May, 1981 to May, 1984 under the self removal procedure contained in Chapter VII-A of the 1944 Rules, the assessment orders were required to be passed by the proper officer under Rule 173 I on the RT-12 returns submitted by the Appellant. Till the assessment

order was passed on the RT-12 returns, there was no question of issuing notice under Section 11-A of the 1944 Act. In the present case, after making endorsements on the RT-12 returns that the assessments were provisional, the assessment order under Rule 173 I was in fact passed on 19-5-1995 after issuing a notice to the appellant on 11-4-1995. By the said assessment order dated 19-5-1995 the appellant was called upon to pay the balance amount immediately. Therefore, the argument of the appellant that no notice has been issued before and after finalisation of the provisional assessment is also devoid of any merit.

48. In the case of ITC Limited (supra), the Apex Court held that finalisation of provisional assessment is sine qua non for issuance of notice under Section 11-A of the 1944 Act. It means that notice under Section 11-A of the Act for non levy or short levy can be issued only after the finalisation of the provisional assessment. In the present case, neither the notice under Section 11-A of the Act is issued before finalisation of the provisional assessment nor after the finalisation of the provisional assessment because, it is not the case of the revenue that there is any non levy or short levy. Therefore, reliance placed by the appellant on the decision of the Apex Court in the case of ITC

Limited is also misplaced. It was feebly contended that the finalisation of the provisional assessment has not been done by a proper officer. This contention was neither raised before the Tribunal nor any question framed to that effect in this appeal. Therefore, such a plea cannot be permitted to be raised in this appeal.

49. In the result, the question framed in this appeal is answered in the affirmative, that is, in favour of the revenue and against the assessee.

50. Accordingly, the appeal is dismissed, however with no order as to costs.

(F.I. REBELLO, J.)

(J.P. DEVADHAR, J.)